

ACLU

AMERICAN CIVIL LIBERTIES UNION
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#4

June 19, 1984

National Board, American Civil Liberties Union

Attention: Ira Glasser

At the June 14 meeting of the ACLU-NC Board of Directors, I was delegated by a majority of the Board to convey our disagreement with the national ACLU's endorsement of HR 5164/S.1324.

We have followed the course of the legislation providing for a FOIA exception for the operational files of the CIA and the controversy which accompanied it for the past year. Until now, we have refrained from taking a position, since the national office had taken only a qualified one until last month when it endorsed the final House version (HR 5164).

In stating our grounds for disagreement, however, we wish to make clear that we do not seek to contribute to making the issue a divisive one in the ranks of civil libertarians. We believe that it is an issue on which civil libertarians can honestly disagree.

We feel that, as Ira Glasser states in his Nation article that the bill is not a civil liberties "disaster." We are not convinced, however, that it does in fact "represent a step forward."

Under the present Administration, it is doubtful if any significant FOIA materials will be forthcoming from the CIA, whether or not HR 5164 is passed. Armed with new discretion to classify material and keep it classified under EO 12356, there is little reason to believe that the CIA will not use this and other exemptions under the FOIA to nullify any possible gains won under the provisions of HR 5164. The exceptions to the exemption for the operational files are not capable of implementation without the willing testimony and cooperation of the CIA officialdom. There is no independent oversight authority or paper trail to establish, for example, that a document in the operational files has lost its immunity because it was secretly circulated outside of the operational files and returned without copies being made. It is doubtful if Bill Casey (or others) will volunteer such information.

cc: [redacted] Vice Chairperson • Leo Hong
[redacted] • Diane Ellis

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Since the provisions of HR 5164 are intended to make only the intelligence product open to scrutiny, this would appear to give a blanket exemption to most of the CIA's covert actions (like the giving of secret funds to Napoleon Duarte), unless it can be established by independent sources of information that the actions were unlawful in the narrow sense of a specific violation of an act of Congress or the Constitution. While it is true that covert actions have been protected by other exemptions (primarily classification) and have become known mainly by illegal leaks, the ACLU has never agreed to their exclusion from public review. The practical, short run, effort of HR 5164 may not add to the concealment of such information, but the principle involved is not unimportant in the long run.

There is also the concern expressed by historians and other academic researchers that the provisions of HR 5164 may lock up the secrets of the CIA covert actions for the duration of the statute. With the passage of time, arguments can be made for the declassifications of ancient materials when a national security rationale is no longer tenable. HR 5164 seems to place another barrier to the eventual release of documents essential to the writing of history.

The CIA is not just another government agency. It has been the position of the ACLU that CIA covert actions were by their nature illegitimate and in direct conflict with constitutional democracy. We have sponsored legislation to prohibit all covert actions and limit the CIA to intelligence gathering and analysis. It would appear that this principled position is contradicted at least in spirit by endorsement of an exemption for the files which contain the records of the covert action branch of the agency. We are giving a mixed message to the membership and undercutting the potential of a long term campaign to achieve a basic reform of an illegitimate agency which has proved itself to be a serious threat to democratic society.

Nor can it be seriously argued that the granting of the exemption to the operational files was the only alternative to a more serious erosion of the FOIA, such as the blanket exemption sought for the entire agency. We have not seriously tested the strength of the public opposition which could have been rallied against such a proposal. The process of negotiation and bargaining which the ACLU undertook in regard to the provisions of S.1324/HR 5164 by their nature did not encourage such a public campaign.

The precedent set by agreeing to the exemption of the operational files of the CIA may haunt us if the FBI and Justice Department launch a campaign to obtain a comparable exemption for the FBI's investigative files. I am assuming that the ACLU's opposition to exempting FBI files is absolute and uncompromising. But our endorsement of HR 5164 certainly does not strengthen our position in re the FBI or other agencies.

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In the balance, therefore, we believe that the negatives outweigh the positives in regard to HR 5164. Based upon my report, the ACLU-NC Board voted to endorse this position in principle and authorized me to convey our position to the national Board.

Sincerely,

Richard Criley (ac)

Richard Criley
Vice Chairperson
ACLU-NC Board of Directors

RC:fmh

cc: Joyce Fiske, ACLU of Southern California
Ramona Ripston, ACLU of Southern California
M. Anne Jennings, National Board Representative, ACLU-NC
Eva Jefferson Paterson, At-large National Board member
Mort Halperin, Center of National Security Studies
Norman Dorsen, President, National Board of Directors